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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 424

OTTO BOORTZ, *Petitioner*

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Fred Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully submits that the Court of Appeals for the Fifth Circuit followed the settled rule announced by the Supreme Court of Texas in determining the issue presented in this case and that a correct result was reached. The petition for the writ of certiorari advances no ground for the granting of the writ.

I

QUESTION PRESENTED

Petitioner says that the question presented is whether the Court of Appeals has the authority or jurisdiction to ignore the interpretations of a state statute by the final appellate authority of that state in rendering a decision presented upon the law of the state. Of course, such a question answers itself; but that question is not presented. The Court of Appeals followed and based its decision on the authoritative decisions of the Texas Courts.

Under the provisions of the Texas Workmen's Compensation Act, no proceeding for compensation can be maintained unless the claim shall have been filed within six months after the injury; provided that for good cause shown, strict compliance may be waived. Art. 8307, Sec. 4a, Revised Civil Statutes of Texas. The good cause must continue from the date of the injury to the date the claim is actually filed. *Petroleum Casualty Company v. Dean*, 132 Tex. 320, 122 S.W. (2d) 1053.

The good cause contemplated by the statute means such a cause as would be considered a reasonable excuse for not filing the claim by a man of ordinary prudence reasonably mindful of his own interests. Ordinarily the existence of good cause is a question of fact to be determined by the jury, but where the undisputed evidence reflects a state of facts about which the minds of reasonable men cannot differ, it is a question of law to be determined by the Court. *Hawkins v. Safety Casualty Company*, 146 Tex. 381, 207 S.W.

(2d) 370; *Anchor Casualty Company v. Beeler*, (Tex. Civ. App.) 245 S.W. (2d) 303; *Copinjon v. Aetna Casualty & Surety Company*, (Tex. Civ. App.) 242 S.W. (2d) 219, writ of error refused by the Supreme Court of Texas.

Such is the rule recognized by the Court of Appeals in the case at bar. The injury occurred on November 23, 1949. The claim was not filed until January 25, 1951. The Court of Appeals held that the undisputed evidence showed that the petitioner did not act as a man of ordinary prudence and reasonably mindful of his own interests in failing to file his claim for fourteen months and two days after the alleged injury; and further, that the undisputed evidence presented a state of facts about which the minds of reasonable men could not differ.

Thus, the real question presented is whether the Court of Appeals reached a wrong conclusion when it held that reasonable minds could not differ on whether the petitioner had good cause for failing to file his claim as required by the statute.

II

STATEMENT OF THE CASE

There is no conflict in the evidence and since the question here presented is whether the Court of Appeals reached a correct conclusion under the evidence which is not disputed, it is necessary for us to review the evidence in more detail than did petitioner.

Otto Boortz was a route salesman for Coca-Cola Bottling Company of Fort Worth. He testified that he received a back injury on November 23, 1949. (R. 28-29). Although his back pained him considerably, he continued to work. A week later on December 1, 1949, his back was so bad that he went to the Coffey Clinic. He said, "I knew I must have pulled something loose." (R. 29). He told them at the Clinic, "I have to have something done with my back." (R. 29).

At the Coffey Clinic he was examined and treated by Dr. Stow who said that he had some strained muscles but would probably be alright if he had heat treatments and shots every other day for two or three weeks. (R. 30). Boortz continued to go to the Clinic two or three times a week through December and on most of those occasions he was seen and treated by Dr. Snyder. (R. 30). His pain continued and he got no relief, so he went to the Buxton-Pease Clinic, a chiropractic group, where he received treatments from the first of the year 1950 until the last of February, 1950 (R. 31, 40, 41). He said that the chiropractic treatments gave him temporary relief but within two or three hours his back would pain him as badly as ever. (R. 31, 41).

By the last of February or first of March, his back

was so bad that he could not work and had to stay at home for about four days. He said:

> "So, I got down, and I was at home, and my wife called them and said, 'Otto ought to go to another doctor because his back is killing him.'
>
> "And I stayed at home about four days, and he said 'Tell Otto to go to Doctor Howell Brown.' " (R. 31).

According to Boortz, Dr. Brown took x-rays and told him that it was nothing serious, that it "was just a little old joint" and that "it is not even big enough to call a joint, that tore loose." (R. 31). Boortz was working and went to see Brown as frequently as he could but the shots were making him sick, he would be awake at night, was nervous, and from time to time losing a few days from work. (R. 31). Sometime during March, Dr. Brown himself became ill and Boortz changed to Dr. Holmes who was associated with Dr. Brown. After Dr. Holmes had seen and treated Boortz for a short while without giving him any relief, he told him that he "gave up". (R. 56).

Dr. Holmes then referred Boortz to Dr. Thomas B. Bussey, an orthopedic specialist. (R. 32, 56, 69). From about the first of April until the latter part of August or first of September, 1950, Boortz was under the treatment of Dr. Bussey. (R. 57, 70). Beginning in January, 1950, Boortz would lose two, three or four days at a time from his work because of back pain. During the time he was being treated by Dr. Holmes a thirty-day lay-off from work was recommended, but the employers wanted Boortz to continue without losing that much time at once. (R. 57).

When the petitioner first went to Dr. Bussey, x-rays were taken and exercises precribed. After about two weeks, Dr. Bussey put him in a flexion type plaster cast (R. 58) and he wore this for about thirty days. (R. 45). It was removed by Boortz himself while Dr. Bussey was out of the city because the heat made it so uncomfortable for him to wear. (R. 58-59).

The back pain and partial disability continued to grow worse (R. 59), and finally on July 31, 1950, Dr. Bussey put Boortz in the hospital and placed him in traction. (R. 59-61, 71). After being in traction in the hospital for several days during which the weights pulling on his legs gave him some relief from pain, Boortz himself had the traction, pulleys, weight, etc., removed about 1:00 o'clock one morning by an intern because, he said, "It was tearing my legs up." (R. 59-60).

After he was taken from traction and while in the hospital, Dr. Bussey prescribed for him and had fitted a back brace. Petitioner testified that he had worn this brace continuously from that time until the time of trial. (R. 61).

Dr. Bussey reached the conclusion that he had exhausted all other meanse of giving him relief so he advised a fusion operation on the back. (R. 62). Dr. Bussey testified that he had talked with Boortz about the matter prior to that time and had tried to explain the back condition to him. (R. 72). Before finally recommending the operation in August of 1950, Dr. Bussey called in Dr. William H. Morgan, also an orthopedic surgeon, for consultation. Dr. Morgan agreed with the diagnosis and with the recommendation of a

fusion operation. (R. 62, 72, 73). Dr. Renshaw testified this would leave not over five or ten percent disability. (R. 55).

In August of 1950, Dr. Bussey also consulted with Dr. Holmes and Dr. Brown with reference to a fusion operation. (R. 62). This consultation was in Boortz's presence. (R. 62). If there could have been any doubt in Boortz' mind about the seriousness of the injury before this time, the recommendation of an operation surely removed it. However, Boortz testified that Dr. Brown said that the operation "would not be bad, all we have to do is to pull those vertabrae apart and sprinkle a few bones in there, and it will heal right back together." (R. 62).

Boortz was unable to make up his mind whether to have the operation. Dr. Bussey testified that while he had exhausted all conservative means and recommended the operation on the back, he always left the decision on the operation up to the patient. (R. 73). In trying to make up his mind about the operation Boortz talked with Mr. Woodson, one of his superiors at the Coca Cola plant, and Woodson told him that he thought before he was "cut on" he should see some other doctors, suggesting Drs. Levy and Lipscomb. (R. 63).

September 8, 1950 was the first time Boortz went to Dr. C. P. Lipscomb. With reference to this first examination, Boortz testified in part as follows:

> ". . . at first I went in there and he stripped me and gave me a toe test, and raked a pin across my stomach, and other tests, and he said, 'Otto, I will tell you something right now, you have

something awful wrong with your back, but if I can find it or not is another question.'

"Q. Didn't Dr. Lipscomb tell you he thought you should have that operation on your back?

"A. No, sir, he didn't. He said, 'If the injection shots don't help', he said, 'don't let nobody cut on your back unless you have to.' He said, 'If these injections don't help, then I would prefer a spinal fusion', or something like that." (R. 63-64).

Throughout the fall of 1950 from September until the 19th of December, Boortz was constantly receiving treatment from Dr. Lipscomb. At some time either in November or early December, he went to see Dr. Busey again and told him that he was not yet ready for the fusion but that if he had his back operated on, he wanted Dr. Bussey to do it. (R. 73). At the time he went to Dr. Lipscomb he had been "pulled off" his route for the obvious reason that he was unable to do anything but the lightest work because of the back injury. In that connection, the petitioner testified:

"A. Well, I was not doing anything then, they pulled me off of the route, they didn't have me working, I just set around down there at the plant, just collecting, and different things like that.

"Q. You didn't do any work during the fall, is that correct?

"A. Just except collecting, and stuff like that, . . .". (R. 64).

Boortz said that on December 19, 1950, Dr. Lipscomb released him, telling him that there was nothing wrong with his back but a strained muscle and that he would

not operate on the back with a strained muscle. He further testified that Lipscomb told him on December 19, "If I cut on your back and mess it up, and I would be walking down the street, and you would say there goes that big so-and-so that messed my back up." (R. 64-65).

Petitioner said that it was on the very next day, December 20, 1950, that he got down completely and could not go at all. (R. 33, 36, 65). Specifically his testimony about that was as follows:

"Q. Now, my question is, when did you first find out and discover that your back was injured?

"A. Well, it was December 20th.

"Q. What year?

"A. 1950.

'Q. What did you do then?

"A. Well, I was going—

"Q. Wait a minute, how did you learn it at that time?

"A. Well, they sent me back on my big route, and I had worked a day and pulled the route, and I came home, I couldn't hardly make it, but I got home, and we had our Christmas that night.

"Q. You had your Christmas at that time?

"A. The Coca Cola Botting Company, and I was unable to make the Christmas party, I was in such pain. My wife and two boys had to go to the Christmas party and get my bonus.

"Q. Your bonus?

"A. Yes, sir. I stayed home, and the next morning I went back to the Coca Cola Bottling Company, to work, and I stayed around in the office, and I was in pain, and Mr. Welch came out there,

and he said, 'Otto, you are sick, you go on home until you feel better.'

"I did, I went home, and I think I stayed three or four days, until after Christmas, and I went back to work, and my back was giving me so much trouble that I couldn't sleep at night, or nothing, and I went ahead and toughed it out until January 6th, and I knew my back had something seriously wrong with it, that it was no minor injury at that time." (R. 33).

On January 9, 1951, Boortz first went to see W. P. McLean, his attorney, and Dr. H. S. Renshaw. (R. 34). On January 16, Dr. Renshaw gave to Mr. McLean a written report covering his opinion and diagnosis. (R. 51). Dr. Renshaw testified as to the history given him by Boortz at the time of his first examination. (R. 44-45). Boortz told him of the various doctors he had been to, of the treatments he had received, and that Dr. Bussey, who had seen Boortz from April of 1950 to early September of 1950, had recommended a spinal fusion. (R. 45, 51). Dr. Renshaw also recommended a spinal fusion. (R. 55).

The first time the petitioner or his attorney took any steps whatever with reference to presenting or prosecuting a claim for Workmen's Compensation was on January 25, 1951 when the claim was filed with the Industrial Accident Board. (R. 75).

III

ARGUMENT

Petitioner recognized that good cause must be established, and pleaded its existence in the following language:

> "Plaintiff would show that his delay in filing said notice with the Industrial Accident Board was brought about through no fault of his own, but by reason of the Doctors employed by Defendant who failed to inform him of the full extent of his injury and thereby mislead him into believing that the injury was not of a severe nature." (R. 6).

It should be observed that these allegations and all proof offered related only to the period from November 23, 1949 to December 20, 1950. There is *no* evidence of any reason for not filing the claim between December 20, 1950 and January 25, 1951. Yet, the Texas courts hold that the "good cause" must continue until the claim is filed. *Petroleum Casualty Company v. Dean*, 132 Tex. 320, 122 S.W. (2d) 1053. Boortz said he knew his back injury was serious on December 20, 1950. (R. 32, 33, 36, 65).

The leading case by the Supreme Court of Texas and cited by petitioner is *Hawkins v. Safety Casualty Company*, 146 Tex. 381, 207 S.W. (2d) 370. In that case the court stated the rule which is found in many cases both prior and subsequent to that one to the effect that ordinarily good cause presents a question of fact, but may be determined against the claimant as a matter of law "when the evidence, construed most fa-

vorably to the claimant, admits no other reasonable conclusion."

The latest authoritative decision by a Texas court is *Copinjon v. Aetna Casualty & Surety Company*, (Tex. Civ. App.) 242 S.W. (2d) 219 (writ of error refused). In that case the plaintiff received an injury on August 5, 1946. Immediately following his fall, he was taken to a hospital where x-ray pictures were made. After four or five days he was discharged from the hospital and returned to work. He filed his claim with the Industrial Accident Board on December 27, 1948. He continued to work until October 1, 1949, nine months after the claim was filed.

As grounds of "good cause" the plaintiff alleged that at the time of his injury the doctor for the insurance company assured him that he would be all right and that his injuries were of a trivial nature, that he believed this, and that when he saw the doctor from time to time he was always assured by him that he would be all right. Further, that not until December 23, 1948, five days before the claim was filed (with Christmas holidays obviously intervening) did he learn the injuries were serious.

Plaintiff testified that he was assured by Dr. Butler, the insurance company doctor, that he could go back to work, and that he only gave him some pills. He apparently consulted the doctor frequently, however, and he testified that nine months after the accident, the doctor again x-rayed his back and told him nothing was wrong with him. He said that a Dr. Stuart, a naturopath, said there was probably something wrong

with the back but refused to examine him until released by Dr. Butler. He further testified that from the time of the fall he suffered extreme pain and had to walk stooped over, but that he had to continue working because of economic necessity.

In affirming the action of the trial court in giving a directed verdict for the defendant, the court said:

> "Taking as true his statements of pain and suffering undergone by him following the accident of August 5, 1946, appellant's action in delaying the filing of his claim until December 27, 1948, does not meet the standard of ordinary prudence. This conclusively appears as a matter of law. To hold otherwise would be to effectively nullify the statutory provision designed to secure the prompt filing of claims and prevent frauds oftimes incident to the filing of stale demands. *We cannot indulge the over-credulous at the risk of admitting the fraudulent, but must follow the public policy of the state as declared by legislative enactment.* The Court correctly instructed the jury to find the for the appellee." (Italics ours).

To say that Otto Boortz could in good faith believe that his injuries were not serious during all the period of time that he was being treated by nine doctors, several of whom recommended operations, and while he was suffering almost constant back pain, does, in the language of the San Antonio Court of Civil Appeals, surely "indulge the over-credulous." In fact, the evidence here presents a much stronger case for a directed verdict than that in the Copinjon case. The plaintiff in the Copinjohn case presented a much more reasonable explanation of his failure to file than did Boortz.

We see no escape from the conclusion that *Copinjon v. Aetna Casualty & Surety Company* is controlling.

The Court of Appeals held in the case at bar that under his own testimony the minds of reasonable men could reach no conclusion other than that the petitioner was not mislead into believing the injury was not severe and that a reasonably prudent man, under petitioner's own evidence, would not have waited from November 23, 1949, until January 25, 1951, to file his claim.

We respectfully submit that such conclusion is a correct one, that the Court of Appeals recognized and applied the rule announced by the Texas courts, and that petitioner's own evidence showed he did not have good cause for failing to file his claim.

WHEREFORE, respondent respectfully prays that this Honorable Court refuse a writ of certiorari.

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